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**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

BENNETT GOLDBERG,

Plaintiff,

BAC HOME LOANS SERVICING,
LP; HSBC BANK USA, N.A.;
NATIONSTAR MORTGAGE LLC,

Defendants.

CASE NO. 13cv0036 JM(BLM)

**ORDER GRANTING IN PART
AND DENYING IN PART
MOTION TO DISMISS;
DENYING MOTION TO
STRIKE; DENYING LEAVE
TO AMEND**

17 Defendants Bank of America, N.A., as successor by merger to BAC Home Loans
18 Servicing LP, (“BAC”), HSBC Bank USA, N.A. (“HSBC”), and Nationstar Mortgage
19 LLC (“Nationstar”) move to dismiss all but the breach of contract claim asserted in the
20 Third Amended Complaint (“TAC”) and to strike the second and third causes of action.
21 Plaintiff Bennett Goldberg opposes both motions. Pursuant to Local Rule 7.1(d)(1),
22 the court finds the matters presented appropriate for decision without oral argument.
23 For the reasons set forth below, the court grants in part and denies in part the motion
24 to dismiss, denies the motion to strike, and denies leave to amend. Defendants are
25 instructed to file a responsive pleading within ten days of entry of this order.

BACKGROUND

27 On January 8, 2013, Defendants removed this diversity action from the Superior
28 County for the County of San Diego. The TAC, filed on August 30, 2013, alleges three

1 causes of action for breach of contract, breach of the implied covenant of good faith
2 and fair dealing, and for declaratory relief.

3 Plaintiff's claims relate to a June 2004 two-year adjustable rate mortgage in the
4 amount of \$400,000 originally obtained from Countrywide Mortgage and subsequently
5 refinanced through Wilshire Mortgage Corporation ("WMC"). (TAC ¶9). In 2007
6 Plaintiff's home was severely damaged by the Witch Creek Fire. At that time, WMC
7 informed Plaintiff that he should not make any more payments on the loan "due to the
8 federal government's financial relief program for fire disaster victims." (TAC ¶10).
9 In October 2009, Plaintiff was informed that he did not qualify for federal disaster
10 relief because he had returned to live in the home. (TAC ¶12).

11 In early 2010, Plaintiff received notice that the servicing of the loan was
12 transferred to BAC. (TAC ¶13). Plaintiff was allegedly unable to obtain information
13 about the status of his mortgage and, on August 23, 2010, Plaintiff commenced an
14 action against BAC in state court alleging, among other things, claims for fraud,
15 negligence and violations of various lending statutes. (TAC ¶16).

16 On March 27, 2011, Plaintiff signed the First Mutual Settlement Agreement
17 requiring Plaintiff to (1) dismiss the state court action, (2) vacate the property, (3) leave
18 the property in "broom clean" condition, (4) pay and maintain all utilities until Plaintiff
19 vacated the premises, and (5) execute a deed transferring Plaintiff's interest in the
20 property to HSBC. (TAC ¶17). In return, HSBC and BAC were to pay Plaintiff \$2,500
21 within five days after he vacated the property. (TAC ¶18).

22 In May 2011, allegedly concerned that there were additional liens on the
23 property, the parties entered into a Second Mutual Settlement Agreement ("SMSA").
24 (TAC ¶20). This agreement added one additional condition providing that "HSBC
25 shall have the option of either accepting a deed from GOLDBERGS or proceeding with
26 foreclosure on the PROPERTY." (TAC ¶21). On or about April 4, 2011, Defendants'
27 counsel, Barry Coleman, represented to Plaintiff's counsel that the additional condition
28 "was inserted so that HSBC could foreclose only if there were any unknown junior

1 liens on the Subject Property.” Id. Knowing that there were no additional liens on the
 2 property, Plaintiff executed the SMSA on May 21, 2011 and, on May 23, 2011,
 3 Plaintiff “sent to Defendants a quit claim deed.” (TAC ¶23).¹ The SMSA also
 4 contained a time is of the essence provision. (TAC ¶22). By July 14, 2011, Defendants
 5 provided Plaintiff with two checks totaling \$2,500. (TAC ¶24). Plaintiff believed that
 6 he had complied with all the terms of the SMSA. (TAC ¶25)

7 At the heart of Plaintiff’s claim is the allegation that BAC and HSBC have
 8 continued to report to credit reporting agencies that Plaintiff is in default on his
 9 mortgage. (TAC ¶26). In August 2012, “one year after accepting the Quit Claim
 10 Deed,” Plaintiff learned that Defendants intended to foreclose on the property. On
 11 November 12, 2012, Defendants filed a Notice of Rescission of a Trustee’s Deed Upon
 12 Sale. (Defendants RJN Exh. L).

13 On March 11, 2013, the court granted Defendants’ motion to dismiss the original
 14 complaint and granted Plaintiff leave to amend. (Ct. Dkt. 11). On May 30, 2013, the
 15 court granted in part and denied in part the motion to dismiss the First Amended
 16 Complaint and granted leave to amend. (Ct. Dkt. 17). On August 21, 2013, the court
 17 granted in part and denied in part the motion to dismiss the Second Amended
 18 Complaint. (Ct. Dkt. 24). Defendants now move to dismiss or strike all claims alleged
 19 in the TAC.

20 DISCUSSION

21 Legal Standards

22 Federal Rule of Civil Procedure 12(b)(6) dismissal is proper only in
 23 “extraordinary” cases. United States v. Redwood City, 640 F.2d 963, 966 (9th Cir.
 24 1981). Courts should grant 12(b)(6) relief only where a plaintiff’s complaint lacks a
 25 “cognizable legal theory” or sufficient facts to support a cognizable legal theory.
Balistreri v. Pacifica Police Dept., 901 F.2d 696, 699 (9th Cir. 1990). Courts should

27
 28 ¹ The court highlights that the Quit Claim Deed allegedly sent by Plaintiff to
 Defendants on May 23, 2011, (SAC ¶23), was executed by Plaintiff on March 30, 2011.
 (FAC Exh. 3).

1 dismiss a complaint for failure to state a claim when the factual allegations are
 2 insufficient “to raise a right to relief above the speculative level.” Bell Atlantic Corp
 3 v. Twombly, 550 U.S. 544, 555 (2007) (the complaint’s allegations must “plausibly
 4 suggest[]” that the pleader is entitled to relief); Ashcroft v. Iqbal, 566 U.S. 662 (2009)
 5 (under Rule 8(a), well-pleaded facts must do more than permit the court to infer the
 6 mere possibility of misconduct). “The plausibility standard is not akin to a ‘probability
 7 requirement,’ but it asks for more than a sheer possibility that a defendant has acted
 8 unlawfully.” Id. at 678. Thus, “threadbare recitals of the elements of a cause of action,
 9 supported by mere conclusory statements, do not suffice.” Id. The defect must appear
 10 on the face of the complaint itself. Thus, courts may not consider extraneous material
 11 in testing its legal adequacy. Levine v. Diamanthuset, Inc., 950 F.2d 1478, 1482 (9th
 12 Cir. 1991). The courts may, however, consider material properly submitted as part of
 13 the complaint. Hal Roach Studios, Inc. v. Richard Feiner and Co., 896 F.2d 1542, 1555
 14 n.19 (9th Cir. 1989).

15 Finally, courts must construe the complaint in the light most favorable to the
 16 plaintiff. Concha v. London, 62 F.3d 1493, 1500 (9th Cir. 1995), cert. dismissed, 116
 17 S. Ct. 1710 (1996). Accordingly, courts must accept as true all material allegations in
 18 the complaint, as well as reasonable inferences to be drawn from them. Holden v.
 19 Hagopian, 978 F.2d 1115, 1118 (9th Cir. 1992). However, conclusory allegations of
 20 law and unwarranted inferences are insufficient to defeat a Rule 12(b)(6) motion. In
 21 Re Syntex Corp. Sec. Litig., 95 F.3d 922, 926 (9th Cir. 1996).

22 **The Motion to Dismiss**

23 Defendants argue that the entire TAC must be dismissed because Plaintiff failed
 24 to join a necessary and indispensable party. Defendants argue that the loan agreement
 25 was entered into by both Plaintiff and Yvette Goldberg, the Deed of Trust identifies
 26 both Plaintiff and Yvette Goldberg as trustees who took title to the property as joint
 27 tenants, and the SMSA was entered into by both Goldbergs. Plaintiff responds that his
 28 former spouse assigned to him all rights to bring the present action.

1 In light of Plaintiff's representation that the claims were assigned to Plaintiff by
 2 his former spouse, the limited role of pleadings in federal court, and the TAC's
 3 allegations, the court concludes that Defendants are sufficiently informed to conduct
 4 adequate discovery. Accordingly, the court denies this portion of Defendants' motion
 5 to dismiss.

6 The Breach of Implied Covenant of Good Faith and Fair Dealing Claim

7 To establish a breach of covenant of good faith and fair dealing claim, Plaintiff
 8 must allege (1) the existence of a contractual relationship; (2) implied duty; (3) breach;
 9 and (4) causation of damages. Smith v. City and County of San Francisco, 225
 10 Cal.App.3e 38, 49 (1990). "The covenant of good faith and fair dealing, implied by
 11 law in every contract, exists merely to prevent one contracting party from unfairly
 12 frustrating the other party's right to receive the benefits of the agreement actually
 13 made." Guz v. Bechtel Nat. Inc., 24 Cal.4th 317, 349 (2000). Outside of the insurance
 14 context, liability for breach of the implied covenant of good faith and fair dealing
 15 sounds solely in contract, not in tort. Cates Construction Inc. v. Talbot Partners, 21
 16 Cal.4th 28, 43-44 (1999). Consequently, compensation for breach of the implied
 17 covenant is "limited to contract rather than tort remedies." Id. at 43.

18 Defendants move to dismiss this claim for two reasons. First, Defendants argue
 19 that the addition of this claim in the TAC exceeded the scope of this court's August
 20 2013 order granting leave to amend. The court rejects this argument because, pursuant
 21 to Rule 15 of the Federal Rules of Civil Procedure, leave to amend is to be freely given
 22 to assert new or modified claims. Second, Defendants correctly argue that this claim
 23 cannot proceed with tort remedies. As set forth in Cates, this claim may proceed with
 24 contract remedies, not tort remedies.

25 In sum, the court grants the motion to the extent Plaintiff seeks tort remedies, but
 26 denies the motion to the extent Plaintiff seeks contract remedies. While Plaintiff
 27 requests leave to amend this claim, the court denies the motion. Plaintiff has already
 28 filed four different complaints and has yet to state a claim affording tort remedies. As

1 there appears to be no circumstances under which Plaintiff can state a claim, the court
 2 denies leave to amend.

3 **The Declaratory Relief Claim**

4 Defendants argue that the declaratory relief claim is an additional remedy, and
 5 not a separate claim. See 2011 WL 5975821, at *9 (S.D. Cal. Nov. 29, 2011). “A
 6 declaratory judgment is not a theory of recovery,” but a remedy. Commercial Union
 7 Ins. Co. v. Walbrook Ins. Co., Ltd., 41 F.3d 764, 775 (1st Cir. 1994); Progeny
 8 Ventures, Inc. v. Western Union Fin. Servs., Inc., 752 F.Supp.2d 1127, 1135 (C.D.
 9 Cal.2010) (“[D]eclaratory relief is a remedy and not a cause of action[.]”); Sullivan v.
 10 JP Morgan Chase Bank, NA, 725 F.Supp.2d 1087, 1099 (E.D. Cal.2010) (“Under
 11 federal law, an injunction is a remedy, not a claim in and of itself. Similarly, under
 12 California law, an injunction is a remedy, not a cause of action.” (citations omitted)).

13 The court notes that this court maintains the power to declare and adjudicate the
 14 rights and legal relationship of the parties with respect to the alleged breach of the
 15 SMSA. Accordingly, the court dismisses the declaratory relief claim as a separate and
 16 distinct claim but notes that it retains the power to provide Plaintiff complete relief.

17 **The Motion to Strike**

18 Defendants argue that the second and third causes of action in the TAC should
 19 be stricken because Plaintiff did not seek leave to amend to assert the implied covenant
 20 claim nor to add Nationstar as a defendant. The court denies this motion.

21 Rule 12(f) provides that “the court may strike from any pleading any ...
 22 redundant, immaterial, impertinent, or scandalous matter.” Fed.R.Civ.P. 12(f).
 23 Motions to strike are generally disfavored. Stabilisierundfonds Fur Wein v. Kaiser,
 24 647 F.2d 200, 201 (D.C.Cir.1981). The court notes that Plaintiff was granted leave to
 25 amend to add, delete, or modify, claims and parties. In light of the liberal federal
 26 pleading requirements, the court denies the motion.

27 In sum, the court denies in part and grants in part the motion to dismiss. The
 28 court dismisses the breach of the implied covenant claim to the extent Plaintiff seeks

1 tort, and not contract remedies and dismisses the claim for declaratory relief. The court
2 denies the motion for leave to amend as Plaintiff has already had four opportunities to
3 state viable claims.

4 **IT IS SO ORDERED.**

5 DATED: October 29, 2013


6 Hon. Jeffrey T. Miller
7 United States District Judge

8 cc: All parties

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